Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-307

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF NELSON A. ROCKEFELLER, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
RICHARD FARBER
BRUCE R. ELLISEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether expenses incurred by a taxpayer in connection with his confirmation as a nominee for executive public office are deductible as "ordinary and necessary expenses paid or incurred * * * in carrying on [a] trade or business" (I.R.C. § 162(a)), where the taxpayer is not in the business of being a government executive at the time of his nomination, and where the office that he seeks differs substantially from the offices that he has previously held.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Carter v. *Commissioner*, 51 T.C. 932 5

Cremona v. *Commissioner*, 58 T.C. 219 5

Davis v. *Commissioner*, 65 T.C. 1014 6

Glenn v. *Commissioner*, 62 T.C. 270 6

Haft v. *Commissioner*, 40 T.C. 2 6

McDonald v. *Commissioner*, 323 U.S. 57 ..... 3, 4, 7

Primuth v. *Commissioner*, 54 T.C. 374 5

Sharon v. *Commissioner*, 591 F.2d 1273, cert. denied, 442 U.S. 941 6

Sherman v. *Commissioner*, 36 T.C.M. (CCH) 1191 6

Vetrick v. *Commissioner*, 628 F.2d 885 6

Page

Constitution and statutes:

U.S. Const. Amend. XXV 2

Internal Revenue Code of 1954 (26 U.S.C.):

§ 162(a) 2, 3, 4, 5, 6, 7

§ 7701(a)(26) 4, 7

Miscellaneous:

Rev. Rul. 75-120, 1975-1 C.B. 55 ..... 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-307

ESTATE OF NELSON A. ROCKEFELLER, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 762 F.2d 264. The opinion of the Tax Court (Pet. App. 19-32) is reported at 83 T.C. 368.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1985. The petition for a writ of certiorari was filed on August 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nelson A. Rockefeller was elected Governor of New York in 1958. He served in that office until 1973, when he resigned. He resigned the governorship in order to devote his full time to the chairmanships of two commissions, the Commission on Critical Choices for Americans and the

National Commission on Water Quality (Pet. App. 3, 13). He performed no executive duties on those commissions, where he served on a volunteer basis (*id.* at 13; Pet. 3).

Upon the resignation of President Nixon in 1974, Vice President Ford became President. On August 20, 1974, President Ford, pursuant to the Twenty-fifth Amendment, nominated Mr. Rockefeller to serve as Vice President (Pet. App. 20). Following his nomination, Mr. Rockefeller underwent lengthy and exhaustive investigations by several federal agencies, the House Judiciary Committee, and the Senate Rules Committee. The Committees were charged with investigating his qualifications for the office of Vice President, including his viewpoints on public issues, his prior public service, and his personal finances (*id.* at 21). Mr. Rockefeller's nomination was duly confirmed by the House and the Senate, and he was sworn in as Vice President on December 19, 1974 (*ibid.*).

Mr. Rockefeller incurred expenses of approximately $550,000 in connection with his confirmation as Vice President. These expenses, which were primarily for legal and other professional services, were incurred in responding to requests by government investigators for documents and information, preparing memoranda and testimony for the congressional Committees, and testifying before those Committees (Pet. App. 2, 21). Petitioners[1] sought to deduct these costs pursuant to Section 162(a) of the Internal Revenue Code[2] as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on [a] trade or

---

[1]Petitioners are the executors of Mr. Rockefeller's estate and his widow, with whom he filed a joint federal income tax return for the year at issue.

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the period at issue (the Code or I.R.C.).

business." The Commissioner disallowed the deductions, and petitioners sought redetermination of the resulting deficiency in the Tax Court (Pet. App. 2-3, 22).

The Tax Court held that Mr. Rockefeller's confirmation expenses were not deductible under Section 162(a). It viewed the case as "control[led]" (Pet. App. 23-25) by the principles of *McDonald* v. *Commissioner*, 323 U.S. 57 (1944). This Court there held that expenses incurred by a taxpayer in seeking election to public office are not deductible as ordinary and necessary business expenses. The Tax Court also concluded that Mr. Rockefeller's confirmation expenses could not be deducted on the theory that he had incurred them to obtain a new position within his *existing* trade or business, which petitioners described as "the business of holding public offices" (Pet. App. 26). The court found that description "too amorphous" to constitute the definition of a single "trade or business" for tax purposes (*ibid.*). Rather, the court concluded that the office of Vice President was a different trade or business from those in which Mr. Rockefeller had earlier been engaged, reasoning that the Vice Presidency is "a unique position * * * with vastly different tasks, activities, and responsibilities from the offices previously held by Mr. Rockefeller" (*id.* at 27). The Tax Court noted the well-settled rule that the expenses of seeking employment in a new trade or business are not deductible (*id.* at 25).

The court of appeals unanimously affirmed (Pet. App. 1-17). Although it departed in some respects from the Tax Court's analysis, it agreed with the Tax Court's conclusion that Mr. Rockefeller was not engaged in any trade or business comparable to the Vice Presidency when he incurred his confirmation costs. It rejected petitioners' argument that Mr. Rockefeller at the time of his nomination was carrying on the trade or business of being a "governmental executive," pointing out that he held no executive public office at

that time, and noting the absence of any evidence to suggest that, when he resigned as Governor of New York, he intended ever to hold executive public office again (*id.* at 13-14). The court of appeals also agreed with the Tax Court's conclusion that being Governor of New York and being Vice President of the United States "are not the same trade or business in the narrow sense in which sameness has been consistently characterized" by courts interpreting Section 162(a) (Pet. App. 15). It noted that the two offices entail substantially different duties and responsibilities, and concluded that it was not "free to disturb" the Tax Court's finding in this respect (*ibid.*). Since the court of appeals based its holding on general tax principles that bar the deduction of expenses incurred in seeking new employment, it found no need to decide whether this Court's decision in *McDonald* would independently prohibit, in circumstances where the taxpayer's current and former positions are substantially identical, deductions for expenses incurred in seeking appointive as well as elective public office (Pet. App. 16-17).

ARGUMENT

The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. That question is essentially factual and warrants no further review.

1. Section 162(a) of the Code allows a deduction for "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business." Section 7701(a)(26) provides that the term "trade or business" includes the performance of the functions of a public office. As the courts below noted (Pet. App. 16, 23), ordinary and necessary expenses incurred by Mr. Rockefeller in performing his duties as Vice President would, of course, be deductible under Section 162(a). But the confirmation expenses at issue here were not incurred in the performance of the functions

of the office of Vice President. Rather, they were incurred in the course of Mr. Rockefeller's efforts to attain that office.

Expenses incurred in seeking a new job within a taxpayer's existing trade or business are generally deductible under Section 162(a) as expenses of "carrying on" that business. *Primuth* v. *Commissioner,* 54 T.C. 374, 377-379 (1970); *Cremona* v. *Commissioner,* 58 T.C. 219, 221-222 (1972); Rev. Rul. 75-120, 1975-1 C.B. 55. Expenses incurred in seeking a job in a new and different trade or business, by contrast, are not deductible. *Carter* v. *Commissioner,* 51 T.C. 932, 934 (1969); Rev. Rul. 75-120, *supra.* The courts below correctly held that Mr. Rockefeller's confirmation expenses were of the latter sort.

First, even if petitioners are correct in their contention that being a "governmental executive" (Pet. App. 10) constitutes a cognizable "trade or business" for purposes of Section 162(a), Mr. Rockefeller was not carrying on that trade or business at the time of his nomination. The only public positions he held at that time were the chairmanships of the National Commission on Water Quality and the Commission on Critical Choices for Americans, positions in which he had no executive duties (Pet. App. 13). As the court of appeals observed (*ibid.*), holding the chairs of these two Commissions and being Vice President are plainly distinct trades or businesses. It is of course true that Mr. Rockefeller, prior to his resignation as Governor of New York in December 1973, had served as a "governmental executive," and it is also true that a taxpayer who has left one job and not yet taken another may be viewed as still engaged in the business of providing the type of services he formerly performed. But a taxpayer may take advantage of this "hiatus" principle only if there is substantial continuity between his past and present employment, and to demonstrate such continuity "a taxpayer must at least show that during the hiatus he intended to resume the same trade or business"

(Pet. App. 14). See *Haft* v. *Commissioner*, 40 T.C. 2, 6 (1963); *Sherman* v. *Commissioner*, 36 T.C.M. (CCH) 1191, 1193 (1977); Rev. Rul. 75-120, *supra*. The court of appeals correctly concluded that petitioners had made no such showing here (Pet. App. 14). Mr. Rockefeller resigned the governorship to devote his full time to volunteer service on his commissions, and there is nothing in the record to suggest that he was then contemplating holding executive public office again. The vacancy in the office of Vice President was not foreseeable until shortly before it occurred.

Secondly, even if one were to ignore the eight-month gap in Mr. Rockefeller's career as a "governmental executive," petitioners would still not be entitled to prevail, since, as both courts below correctly held, being a governor and being Vice President are not the same "trade or business" (Pet. App. 14-15, 27). If substantial differences exist in the tasks and activities that two positions entail, each constitutes a distinct "trade or business." See *Davis* v. *Commissioner*, 65 T.C. 1014, 1019 (1976); *Glenn* v. *Commissioner*, 62 T.C. 270, 275 (1974). The courts, moreover, have insisted upon a "high degree of identity" (Pet. App. 10) in this respect. See, *e.g.*, *Vetrick* v. *Commissioner*, 628 F.2d 885, 886-887 (5th Cir. 1980); *Sharon* v. *Commissioner*, 591 F.2d 1273, 1275 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979); *Glenn* v. *Commissioner*, 62 T.C. at 275. As the court of appeals properly noted here, a governorship entails many duties and activities that find no counterpart in the Vice Presidency, and vice versa (Pet. App. 15). Indeed, the office of Vice President is a unique position, in part because the Vice President's most important task is "readying himself for the possibility of assuming the Presidency on a moment's notice" (*ibid.*). In any event, the determination whether two positions are sufficiently "identical" for purposes of Section 162(a) is essentially factual (see Pet. App. 15), and the resolution of that question by the courts below warrants no further review.

2. There is no merit to petitioners' contention (Pet. 12-14) that the decision below conflicts with this Court's decision in *McDonald* v. *Commissioner, supra.* The Court there held that campaign expenses incurred by a judge seeking reelection are not deductible as business expenses under Section 162(a). Obviously, there is no conflict between that holding and the holding below; quite the contrary, the Tax Court not implausibly relied on *McDonald* in support of its result.

Nor is there any merit to petitioners' broader contention (Pet. 13) that the decisions below "deny to Mr. Rockefeller and all other public officials a class of deductions allowed to employees in the private sector," in asserted conflict with Section 7701(a)(26) and principles that petitioners seek to draw from *McDonald.* The court of appeals did not rely either on *McDonald* or on Section 7701(a)(26). Rather, it applied to Mr. Rockefeller the same rules of general tax law that are applicable to employees in the private sector, comparing Mr. Rockefeller's old job with his new one and finding them so dissimilar as to constitute discrete trades or businesses. The "issues of wide-ranging impact" (Pet. 6) to which petitioners devote the bulk of their discussion are issues that the court of appeals found it unnecessary to reach. This case presents no occasion for this Court to address questions that the court of appeals correctly concluded that it was not required to decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
RICHARD FARBER
BRUCE R. ELLISEN
Attorneys

NOVEMBER 1985

DOJ-1985-11